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No. 9220

United States
COURT OF APPEALS
for the Ninth Circuit

MARTHA JORDAN,

Appellant,

vs.

STATES MARINE CORPORATION OF DELAWARE, a corporation,

Appellee.

APPELLANT'S BRIEF

On Appeal from the United States District Court for the District of Oregon.

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41 STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 3-58

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JURISDICTION

The United States District Court for the District of Oregon had jurisdiction of this proceeding at law by reason of Title 28, U.S.C.A., Section 1441.

The United States Court of Appeals for the Ninth Circuit has jurisdiction to review the judgment of the United States District Court for the District of Oregon by reason of Title 28, U.S.C.A., Section 1291.

The complaint was filed in the Circuit Court of the State of Oregon for the County of Multnomah on June

17, 1957 (Tr. Rec. 3). The appellee then within twenty days from service of the summons, filed a petition with the District Court of the United States for the District of Oregon for removal of the civil cause from the state court (Tr. Rec. 3). The complaint, petition for removal and the request for admissions show diversity of citizenship between the parties; the appellant is a resident and citizen of the State of Oregon and the appellee is organized and existing under the laws of the State of Delaware (Tr. Rec. 3, 5, 7, 15). The controversy exceeds the sum of $3,000.00 exclusive of interest and costs (Tr. Rec. 4, 11).

Upon removal of the cause from the state court and filing of requests for admissions, the appellee moved the Court to dismiss the cause or for a summary judgment (Tr. Rec. 12, 21). Upon argument, the Honorable Gus J. Solomon, a judge of the District Court, ordered that a summary judgment be entered in favor of the appellee dismissing the cause and the same was entered October 1, 1957 (Tr. Rec. 22). On October 30, 1957, notice of appeal was duly filed (Tr. Rec. 23) and an appeal duly taken to and perfected in this Court.

STATEMENT OF THE CASE

This is an action at law by the appellant, the wife of a seaman who was injured at sea as a result of the unseaworthiness of a vessel owned and operated by the appellee and the negligence of the appellee in certain particulars during the time that the appellant's husband was employed aboard the vessel, for loss of consortium, con-

sisting of loss of society, services, companionship and sexual intercourse. The appellant was and is a resident and citizen of the State of Oregon during all times mentioned herein.

Johnnie Jordan, the husband of the appellant, brought an action under Section 33 of the Merchant Marine Act of June 5, 1920 in the Circuit Court of the State of Oregon for the County of Multnomah, against the States Marine Corporation, the appellee, in Civil Action No. 231-758 and after trial a judgment for $20,-166.75 and costs was secured but all was remitted except $12,666.75 and costs; that on or about May 27, 1957, the States Marine Corporation fully satisfied said judgment of record.

Recovery was obtained for injuries sustained by Johnnie Jordan when he was caused to fall on January 3, 1956 and again on February 16, 1956 due to the negligence of the appellee and/or unseaworthiness of the vessel SS "COTTON STATE." Johnnie Jordan was at the time of these two occurrences aboard the vessel on the high seas between California and the Far East. These same facts are the basis for the appellant's independent cause of action now before this Court.

Johnnie Jordan on or about May 27, 1957, executed in writing a full and complete release of all claims against States Marine Corporation (Tr. Rec. 15) and did receive the sum of $14,000.00 in settlement and payment in full of the judgment and all claims and demands whatsoever against the States Marine Corporation.

The instant case was originally filed in the Circuit Court for the State of Oregon for the County of Multnomah, the appellant's residence and domicile, and upon appellee's petition, the cause was removed to the District Court of the United States for the District of Oregon and there a summary judgment was entered dismissing the action for failure to state a claim upon which relief could be granted.

ASSIGNMENT OF ERROR

The appellant hereby assigns as error the summary judgment of the District Court dismissing the action of the appellant for failure to state a claim upon which relief could be granted.

ARGUMENT OF THE CASE

Point 1. Under the law of Oregon a wife can recover for loss of consortium due to the negligence or wrong of a third party.

Elling v. Blake-McFall Co., 85 Or. 91, 166 Pac. 1957 (1917).

Pugsley v. Smyth, 98 Or. 448, 194 Pac. 686 (1921).

Keen v. Keen, 49 Or. 362, 90 Pac. 147 (1907).

Kosciolek v. Portland Ry., L. & P. Co., 81 Or. 517, 160 Pac. 132 (1916).

Sims v. Sims, 76 Atl. 1064.

Cowgill, Adm'r. v. Broock, Adm'r., 189 Or. 282, 218 P. 2d 445 (1950).

Smith v. Smith, 205 Or. 286, 287 P. 2d 572 (1955).

Ellis v. Fallert, et al, 209 Or 406, 307 P. 2d 283 (1957).

Cooney v. Moomaw, et al, 109 F. Supp. 448 (DCND 1953).
Hitaffer v. Argonne Co., 193 F. 2d 811 (DC Cir 1950).
Missouri Pacific Transportation Co. v. Miller, 299 S. W. 2d 41 (Ark 1957).
Acuff v. Schmidt, 78 N.W. 2d 480 (Iowa 1956).
Brown v. Georgia-Tennessee Coaches, Inc., 88 Ga. App. 519, 77 S. E. 2d 24.
Delta Chevrolet Co. v. Waid, 51 So. 2d 443 (Miss. 1951).
Deshotel v. Atchison, Topeka & Santa Fe Railway Co., 319 P. 2d 357 (Calif. 1957).
Grist v. French, 136 Cal. App. 2d 247, 288 P. 2d 1003 (1955).
Best v. Samuel Fox Co., 2 King's Bench 654, 2 All Eng. 116 (1951).
22 Univ. Mich. L. Rev. 1.
ORS 108.010.

Point 2. The appellant-wife has an independent cause of action for loss of consortium due to the wrongful conduct of the appellee, distinct from that of her husband, granted by the State of Oregon, the place of the appellant's domicile, though both injuries arose from the same wrongful conduct.

Valentine v. Polk, 95 Conn. 560, 111 Atl. 869 (1920).
Smith v. Smith, supra.
Giddings v. Giddings, et al, 167 Or. 504, 114 P. 2d 1009 (1941).
ORS 108.010.
8 History of English Law (3d ed. 1932) p. 429.

Point 3. The tort against the seaman-husband was a maritime tort; the breach of duty and the injury sustained occurred upon the high seas. But as to the appellant, the place of the wrong or the place where she

sustained her injury was in Oregon, the state of her residence and domicile.

Frankel v. Bethlehem Fairfield Shipyard, 46 Fed. Supp. 242, 244 (DC Md).
Forbes v. Forbes, 152 Or. 691, 55 P. 2d 727 (1936).
Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.
Cooney v. Moomaw, supra.
The Admiral Peoples, 55 U.S. 649, 55 S. Ct. 885, 79 L. Ed. 1633 (1935).
Otey v. Midland Valley R. R. Co., 108 Kan. 755, 197 Pac. 203 (1921).
Hunter v. Derby Foods Inc., 110 F. 2d 970 (CCA 2d 1940).
Anderson v. Linton, 178 F. 2d 304 (CCA 7th 1949).
Rundell v. LaCampagnie Generale Transatlantique, 100 F. 655 (CCA 7th 1900).
Rabel, The Conflicts of Laws, A comparative Study, Vol. II, page 346 (1st ed. 1947).
Beale, Vol. II Section 377.2.
Restatement of Conflict of Laws, Section 377.

Point 4. Recovery is not barred to the appellant by the Jones Act or the general maritime law.

Westerberg v. Tide Water Associated Oil Co., 110 N. E. 2d 395, 1953 AMC 553.
Garrett v. Moore-McCormick Co., 317 U.S. 239, 1942 AMC 1645.
The Hamilton, 207 U.S. 398, 52 L. Ed. 264, 28 S. Ct. 133.
American Steamboat Co. v. Chase, 16 Wall 252, 21 L. Ed. 369.

A husband may maintain an action for loss of consortium when the loss thereof is occasioned by the negligence of a third person under the law of Oregon and under the great weight of authority. *Elling v. Blake-*

McFall Co., 85 Or. 91, 166 Pac. 1957 (1917), and cases cited therein. The rule was there stated, 85 Or. at 94 ". . . legislation of modern times has greatly affected the status of married women by the recognition of their rights to a separate existence, thus empowering them to exercise dominion over their separate property, and to contract, and conferring upon them power to sue or to be sued; but it has not in any wise abridged the common-law right of a husband to the companionship, love and services of his wife which are comprehended in the term 'consortium' and his accompanying right to sue therefor, in the event of its loss occasioned by some personal injury to her, *negligently inflicted by a third person* . . . we are not in accord with the assertion that a husband is entitled to recover damages for the loss of the services of his wife only in actions for seduction, alienation of affections and the like." *Pugsley v. Smyth,* 98 Or. 448, 194 Pac. 686 (1921).

It is clear then, as to a plaintiff husband, he may recover for loss of consortium whether its loss was occasioned by the negligent or intentional act of another in this jurisdiction.

Keen v. Keen, 49 Or. 362, 90 Pac. 147 (1907), established the right of a wife to have redress "against one who wrongfully takes her husband from her." That case involved an intentional tort wherein the plaintiff wife sued for alienation of her husband's affections. The Court said there that consortium includes the husband's society, love and assistance and that a married woman should have a remedy for the vindication of a violated right and that her rights and obligations have been

greatly increased and enlarged by the enabling statutes and the law now affords her an adequate *remedy*.

The question of whether a wife could recover for loss of consortium due to the negligence of a third person, first came before the Oregon Supreme Court in *Kosciolek v. Portland Ry., L. & P. Co.,* 81 Or. 517, 160 Pac. 132 (1916); the court denied redress to the plaintiff's wife. The right of the husband to maintain such an action was admitted but the Court held the wife was unable to maintain such an action at common law and the married women's act did not confer on a wife any new right of action, but merely allows her to act independently of her husband for redress in the courts of the *infringement of rights which she already had;* a claim for the loss of the society or assistance of a husband cannot be enforced by either a wife or widow, *unless created by statute,* since consortium is not a natural right *nor a right of the wife recognized at common law*. The court did recognize the right to redress by the wife where there was a direct attack upon the marriage relation itself as in the case of alienation of affections or criminal conversation.

In an article in 22 Univ. Mich. L. Rev., page 1, entitled "The Change in the Meaning of Consortium," Professor Evans Holbrook destroys the courts' rationale by pointing out that the absence of cases in the common law reports is explained by the *procedural impediment* to a wife suing in her own name. The cases do not deny such a right, the procedural impediment simply prevented its recognition or growth. The Married Women's Acts were designed to place the wife on legal parity with the husband and they undermine the validity of the objection.

That the cause of action in the wife for loss of consortium was a matter of the *remedy* as held in *Keen v. Keen* and not the right itself was recognized in an early New Jersey case, *Sims v. Sims,* 76 Atl. 1064, (though that case involved an intentional and not a negligent tort):

> "That the right to consortium was recognized by the common law as an existing right in the married woman, however, but incapable of enforcement, owing to the common law doctrine of identity of personality, is made clear by Blackstone, who, in his third volume, dealing with 'Private Wrongs' mentions a class in which the common law, failing to provide a remedy, recognized the right of the ecclesiastical courts, or their successor, to administer redress, 'not for the reformation of the party injuring, but for the sake of the party injured; to make him a satisfaction and redress for the damages he has sustained.' (Here the court refers to Blackstone's discussion of injuries respecting the rights of marriage.) . . . This recognition by the common law of the fact that the loss of consortium was an injury to the wife, and that its enforcement was her right, and the corresponding failure, on the other hand, to provide her with a legal *remedy* for the tort, is properly definitive of her state at common law, and places that branch of legal learning upon its proper footing. From which it must follow, that if at any time the legislature should remove the common law impediment as to remedy, the right existing is thus made capable of enforcement. That the common law courts failed to find a remedy is, under the decisions, rather a recognition of the right, than a denial of its existence. For it may be said that the history of common law procedures is largely the history of substantive rights, remediless at first for lack of a suitable writ or precedent in the Registrum Brevium, until the persistence of the demand for a *remedy* developed the action of trespass on the case as a general specific in consimili causa, under the provisions of the statute of Westminster II. The fol-

lowing cases also serve to illustrate the existence of this right of common law: *Firebrace,* 4 P. B. 63; *Yelveton,* 1 Siv. & Tr., 586; *Ormi,* 2 Add. Ex. 382; *Reg. v. Jackson,* 1 Q.B. 685."

The case goes on to cite *Lynch v. Knight,* 9 H. L. Cas. 577; 11 Irish Jurist, 284 as illustrating the endeavor of the English judges at that time to supply a remedy for a conceded, existing right; that is the wife's right to redress for loss of consortium or conjugal society. See also 3 Blac. Com. 94; *Orme v. Orme,* 2 Addams Eccl. Rep. 382; 1 Bishop, M., D. & S. secs 69, 1357; *Burrows v. Burrows,* 2 Swabey & T. 303.

It is universally recognized that the purpose of the Married Women's Acts was to place husband and wife on the same legal footing and to remove the procedural impediments with which the common law had shackled her. In recognizing this intention of the Acts, some courts have gone so far as to hold these Acts took away the husband's right to sue for loss of consortium. See 22 Univ. Mich. L. Rev., page 1, supra, in which Professor Holbrook criticizes these cases, and says that a much better result would be obtained by recognizing the right in the wife. There is no question but that he had the right at common law to sue for loss of his wife's consortium. If the law must be made symmetrical, let its symmetry embrace reason and justice.

In 1931, the question of whether the married women's acts gave a wife a right of redress for loss of consortium against one negligently injuring her husband was again before the Oregon Supreme Court in *Sheard v. Oregon Electric Ry. Co.,* 137 Or. 341, 2 P. 2d 916 (1931). The

plaintiff there contended that the decision in *Kosciolek v. Portland Ry. L. & P. Co.,* supra, which held that such an action could not be maintained, was weakened if not overruled by *Elling v. Blake-McFall Co.,* supra, and the principles of law employed in *Keen v. Keen,* supra.

The Court made a distinction between the allowance of recovery in a case of an intentional tort and that of a negligent tort upon damages, holding in the former the sole wrong or injury is to the wife and that she has a direct and not a derivative chose in action and the husband being in pari delicto could hardly be expected to maintain the action. In the latter, damage money paid to the husband assumes that all wrongs resulting from the negligent act will be righted. What the court failed to consider is that the wife, who has equal rights in the conjugal relationship, though she has theoretically been reimbursed for the impairment of the husband's ability to support her, her right to his society, love, assistance and a full and healthy family life has been interferred with or lost without redress.

The Court in the inconsistency of allowing the husband recovery in an action for the loss of consortium through the negligence of another but denying the right to the wife, notwithstanding the enabling statutes, did so on the basis of lack of precedent for holding otherwise and felt any change would have to be by legislative determination. On the same theory it would be necessary for the court to reverse itself in *Cowgill, Adm'r. v. Broock, Adm'r.,* 189 Or. 282, 218 P. 2d 445, where the administrator of an unemancipated child was allowed re-

covery for the gross negligence of his father in an action against the father's estate.

However, such a change was made by the legislative body by the Laws of 1941, ch. 228, ORS 108.010:

> "All laws which impose or recognize civil disabilities upon a wife which are not imposed or recognized as existing as to the husband hereby are repealed; and all civil rights belonging to the husband not conferred upon the wife prior to June 14, 1941, or which she does not have at common law, hereby are conferred upon her, including, among other things, *the right of action for loss of consortium of her husband.*"

Since the amendment there have been two cases in which this statute, as amended has been considered. In *Smith v. Smith,* 205 Or. 286, 287 P. 2d 572 (1955) the court said:

> "The provision granting to the wife the substantive right to sue for loss of consortium illustrates the purpose of the lawmakers to place her on a par with her husband. That enactment merely gave her the right which the common law had given to her husband.
>
> ". . . the statute as it was before the 1941 amendment was held by this court to have conferred no new right of action upon a wife."

In *Ellis v. Fallert, et al,* 209 Or. 406, 307 P. 2d 283 (1957) the plaintiff wife claimed a right to recover for loss of consortium through the alleged negligence of the defendant. Her husband had been injured while working for the defendants; they and the plaintiff's husband were all subject to the provisions of the Workmen's Compensation Law at the time of the injury. The court said:

> "For the purposes of this case we shall assume (emphasis added) that if plaintiff's husband was not under the Workmen's Compensation Act, she would have a cause of action against the defendant for the negligent injury to her husband, resulting in loss of consortium, and that such right would be accorded to her under the provisions of ORS 108.010 . . . ."

The court denied the plaintiff's right to recover under the conditions of the case since the Workmen's Compensation Law in ORS 656.152 (2) states:

> "The right to receive such sums *is in lieu of all claims against his employer.*

and because of the fact the plaintiff's husband had received additional compensation as a married claimant and by this fact distinguished it from *Hitaffer v. Argonne,* supra.

Though there has been no direct holding that a wife can recover for the loss of consortium due to the negligence of a third party in Oregon, such a conclusion is inevitable for the following reasons:

1. ORS 108.010, supra.

2. *Smith v. Smith,* supra, which found that the right of a wife to sue for loss of consortium is to be measured by the right which a husband has to sue for loss of consortium when his wife is *wrongfully* injured.

3. *Elling v. Blake-McFall,* supra, which allowed to the husband a right of recovery for the loss of consortium when his wife was injured by the negligence of the defendant.

4. The weakness in the court's argument in cases de-

cided prior to the 1941 amendment to the statute in denying recovery to the wife.

5. The recent trend in others jurisdiction of allowing the wife redress without legislative enactment.

(1) Cooney v. Moomaw, et al, USDCND 1953, 109 F. Sup. 448.

(2) Hitaffer v. Argonne Co., 193 F. 2d 811 DC Cir (1950).

(3) Missouri Pacific Transportation Co., v. Miller, 299 S. W. 2d 41 (Ark 1957).

(4) Acuff v. Schmit, supra, 78 N. W. 2d 480 (Iowa 1956).

(5) Brown v. Georgia-Tennessee Coaches, Inc., 88 Ga. App. 519, 77 S. E. 2d 24.

(6) Delta Chevrolet Co. v. Waid, 51 So. 2d 443 (Miss. 1951).

(7) Grist v. French, 1955, 136 Cal. App. 2d 247, 288 P. 2d 1003; Deshotel v. Atchison, Topeka & Santa Fe Railway Co., 319 P. 2d 357, (Calif. 1957).

(8) Best v. Samuel Fox Co., 2 King's Bench 654, 2 All Eng. 116 (1951). Holding that the wife may recover for loss of consortium lost through the negligence of a third person if a *total loss of consortium,* but no recovery when only a loss of one element which goes to make up consortium resulted.

The action at bar is predicated neither upon the Jones Act nor the General Maritime Law. It is instituted on the theory of *negligence* or wrongful misfeasance or non-feasance; an action by the appellant to recover for damages she sustained independent of her husband. Appellant is suing in her own right, a right given

to her by ORS 108.010, and not as a subrogee or legal representative of the employee-husband. She does not come to this Court as an assignee of her husband but she comes in her own right to seek redress for injuries which she sustained due to the appellee's wrongful conduct. The wife's loss of companionship, solicitious care and sexual intercourse are personal to her and cannot be recovered by her husband's recovery.

The right of a spouse to consortium is a property right growing out of the marriage contract and includes the exclusive right to the society, companionship and conjugal affection of each other. *Valentine v. Polk,* 95 Conn. 560, 111 Atl. 869 (1920). At common law the same principles applying to the servant were applied to the wife. The husband's interest in his wife's consortium, unlike the parent's interest in the consortium of his children was considered to be *sufficiently proprietary* to support an action of trespass. This is quite distinct from the right which the husband had jointly with his wife to sue for wrongs committed against her. The latter right depended upon the incapacity of the wife to sue in her own name. 8 History of English Law (3d ed 1923) p. 429. The Oregon court in *Smith v. Smith,* supra, held that the right of the wife to sue for loss of consortium is to be measured by the right which a husband has to sue for loss of consortium when his wife is wrongfully injured. Based upon that decision then, the wife's present right to recover is the same as a husband had which was and is an independent wrong and not derivative. In this action if the appellant's right of consortium was not a separate right, the decision of the State court in *John-*

nie Jordan v. States Marine Corporation of Delaware would be res judicata as to the alleged negligence or wrongful conduct of the appellee, and as to the right of the appellant to a recovery herein, but this cannot be, inasmuch as the previous litigation was between different parties and involved a different right. Appellant's right exists by virtue of ORS 108.010 (supra). She has a substantive proprietary interest in the conjugal status or contract and the appellee's conduct was the incident of injury to her right which the state of the marital domicile protects against the wrongful interference by third parties. The State has a special interest in the marital status and it has long been the settled policy of the law to guard and maintain it (the marriage) with watchful vigilance. *Giddings v. Giddings, et al,* 167 Or. 504, 114 P. 2d 1009 (1941).

While it is true that the breach of duty by the appellee, which caused injuries to appellant's husband and allegedly caused an independent injury to the appellant, occurred while the appellee's vessel was at sea and while he, as a seaman, was employed in service on that vessel, it does not follow that the tort to the wife and the tort to the husband were both maritime torts.

Whether a tort is "maritime" and, therefore, within admirality jurisdiction is ordinarily determined on the basis of whether it occurs on navigable waters or on land. *Frankel v. Bethlehem Fairfield Shipyard* (DC Md), 46 F. Supp. 242, 244. There is no question that the tort to the husband was a maritime tort. But the appellant was not at sea and the injury she sustained

was in the State of Oregon, the place of the parties marital domicile, which has granted to her a substantive right to recover for interference with her consortium by third parties. Her right was a continuing right, she did not leave the jurisdiction of the State or its courts to go into another jurisdiction. Therefore, the law of the State of Oregon has the exclusive power to finally determine and declare what act or omission in the conduct of another shall impose liability in damages for the consequential injury. The place of the injury to the appellant wife was Oregon and it is the law of that state which must control. *Forbes v. Forbes,* 152 Or. 691, 55 P. 2d 727. To apply the law of any other jurisdiction to this case would be the granting of extra-territorial affect to the law of that particular jurisdiction. In view of *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, the federal courts are bound to follow the law of the State of Oregon in this cause. See also *Cooney v. Moomaw,* supra.

"According to a universally settled rule," Rable, The Conflict of Laws, A Comparative Study, Vol. II, page 346 (1st ed 1957), " a tortious act done on board a vessel on the high seas, *whereby only persons or property on board are injured* is governed by the law of the flag the vessel flies." *The Admiral Peoples,* 55 S. Ct. 885, 295 U.S. 649, 79 L. Ed. 1633 (1935). The appellant comes within the exception of the rule since she was not on board the SS COTTON STATE when she suffered her independent injury. Under the American rule of conflict of laws the place of the wrong is where the person or thing harmed is situated at the time of the wrong.

Beale, Vol. II Sec. 377.2. Or as stated in the Restatement of Conflict of Laws, Section 377:

> "The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place."

An unlawful and faulty act is not a tort until it creates an injury. Where the injury takes place is the place of the wrong. *Otey v. Midland Valley RR Co.,* 108 Kan. 755, 197 Pac. 203 (1921). The fact that the appellee's conduct occurred on the high seas does not oust the law of Oregon. *Hunter v. Derby Foods, Inc.* (2 CCA 1940), 110 F. 2d 970; *Anderson v. Linton,* 178 F. 2d 304 (7 CCA 1949); *Rundell v. LaCampagnie Generale Transatlantique* (7 CCA 1900), 100 F. 655. See also Beale, Conflict of Laws, Vol. II, Sec. 377.2: "Where the injury is caused not directly but as the result of a train of consequences, the place of injury presents more difficulty, but these difficulties disappear if one keeps in mind the fact that the right injured is that created by the law to protect the person or thing from the injury, and that the law is the law of the place where the person or thing is situated at the time of the injury."

In *Westerberg v. Tide Water Associated Oil Co.,* 110 N. E. 2d 395, 1953 AMC 553, the wife of a seaman sued for loss of consortium arising from injuries sustained by her seaman husband while employed in the service of a vessel on the high seas. The New York Court of Appeals denied recovery to the wife stating that the alleged *breach of duty was a maritime tort* and as such cannot furnish as a basis for the action since recovery is not within

the purview of the Jones Act citing *Garrett v. Moore-McCormick Co.,* 317 U.S. 239, 1942, AMC 1645, as its authority. It is submitted that the Garrett decision does not preclude recovery by the appellant in the instant case since her suit is not "rested on asserted rights granted by federal law" but upon rights rooted in state law. Mr. Justice Holmes held in *The Hamilton,* 207 U.S. 398, 52 L. Ed. 264, 28 S. Ct. 133, that a claim for death on the high seas, arising purely from tort, could be maintained under the survival statute of the State of Delaware, though the *wrongful acts* operated outside the territory of the state, and though no such right was recognized in general maritime law. Recovery would be barred *only* if the national government under a power delegated to it by the Constitution of the United States qualifies the authority which the states would possess.

In *American Steamboat Co. v. Chase,* 16 Wall. 522, 21 L. Ed. 369, it was held that state courts can exercise jurisdiction and give a remedy for a consequential injury growing out of a maritime tort where no remedy for such an injury exists in the general maritime law. Under this decision, the appellant has a course of action even though the wife's right of redress for loss of consortium is recovery for a consequential injury growing out of a maritime tort to her husband where no remedy for such an injury exists in admirality.

The appellant in her action is seeking redress for injuries she sustained due to the appellee's negligence, and neither the Jones Act nor the general maritime law is applicable. While the breach of duty as to the appel-

lant's husband which was the proximate cause of his injury was a maritime tort, appellant suffered an independent injury on *shore* and is not suing to recover damages sustained by her husband.

Respectfully submitted,

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